Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE
UNITED STATES

WILLIAM ALLEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a prospective juror has repeatedly expressed a bias and inability to be impartial, is a final statement related to the burden of proof sufficient to negate the prior statements, particularly where the prospective juror is told by the district court that her bias is permissible?

2. Is a statement reflecting that a prospective juror will give the defendant "the benefit of the doubt" a sufficient statement reflecting the juror's duty to hold the government to the standard of proof beyond a reasonable doubt?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Seventh Circuit were Petitioner William Allen and Respondent United States of America.

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PETITION FOR A WRIT OF CERTIORARI

William Allen petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App. 1-13) is reported at 605 F.3d 461. The court of appeals' order denying Allen's petition for rehearing (App. 28) is unreported. The district court's judgment and sentencing order (App. 14-27) is unreported. The district court's oral ruling (App. 28-37) is unreported.

JURISDICTION

The court of appeals entered judgment on May 25, 2010. App. 1-13. The court of appeals denied a timely filed petition for rehearing on August 4, 2010. App. 28. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be ... deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

STATEMENT OF THE CASE

This case provides the Court an opportunity to draw a clear line regarding the circumstances under which a potential juror who expresses bias against a criminal defendant may be seated on a jury. A juror who expresses a bias but later unequivocally states that she can be fair may be seated. A biased juror who does not unequivocally state she can set aside that bias must be stricken for cause.

In this case, a biased juror was seated over a defense challenge based on her statement that she would give the defendant "the benefit of the doubt" until the close of the evidence. The prospective juror never stated that she could be fair and impartial. Quite to the contrary, she repeatedly stated orally and in writing that a past experience would make her biased and partial. The defendant was charged with possessing child pornography. The prospective juror told the district court in writing and orally that she could not be fair and impartial in such a case because her daughter had suffered a near-kidnapping and molestation. A majority of the Seventh Circuit panel that reviewed the case found no error. Judge Diane Wood, however, dissented and

took exception to the majority's decision. (App. 12-13) Judge Wood concluded that William Allen's right to due process and an impartial jury was violated by the seating of this juror.

Allen was charged with various offenses related to making or posting a notice seeking or offering to receive or exchange child pornography, transporting or shipping images of child pornography in interstate commerce, and possession of child pornography. Prior to trial, the district court had ruled that the government could admit evidence in the form of internet chat logs reflecting that Allen had previously discussed and admitted to actually molesting minors.

Before appearing in court, prospective jurors had completed written questionnaires. One of the prospective jurors, Prospective Juror No. 31, was brought to a side bar to discuss certain answers in her jury questionnaire. Juror No. 31's questionnaire identified an incident in which a man attempted to kidnap and molest her daughter. As to the impact of that experience on Juror No. 31, the questionnaire stated:

> 25. Is there anything about the nature of the charges in this case that would make it hard for you to be fair?
>
> [Answer:] Yes - because of the past experience my daughter went through

> 26. Is there anything else that might make it difficult for you to be fair to either the government or the defendant in this case? If so, please explain.
>
> [Answer:] Yes, because of my daughter

(App. 42)

At sidebar, Juror No. 31 explained an incident that had occurred with her then six-year-old daughter wherein a man had chased the child with his car, and attempted to abduct her and her friend. All of this was done while the man was only half dressed. (App. 31) When first asked by the court whether "that experience would somehow prejudice [her] against the defendant in this case," Juror No. 31 stated unequivocally, "yes." (App. 32) Further examination by the court resulted in Juror No. 31 stating that she "certainly would try to be open-minded" and that she thought she could be, and that she could "perhaps" set the experience aside. (App. 32-33)

After the district court completed its inquiry, defense counsel asked Juror No. 31 several questions. The following colloquy was had:

> MR. GARFINKEL: So, I am going to ask you - - I don't want to lead you at all - - would it be difficult, based on that past experience, for you to be fair and impartial?

> PROSPECTIVE JUROR [No. 31]: With the past experience, I don't know; but, the circumstances that he said for trial bothers me personally, with having children and a little girl.
>
> MR. GARFINKEL: So, the charges - - the child pornography - - just the nature of the charges alone would make it difficult for you to be fair to both parties?
>
> PROSPECTIVE JUROR [No. 31]: Yes, it would. I am sorry, it would.

(App. 34)

Following this colloquy with defense counsel, the district court again questioned Juror No. 31 as follows:

> THE COURT: Does the charges themselves - - would you start out one way or the other?
>
> PROSPECTIVE JUROR [No. 31]: I would - - I don't know if I - - I don't know. I honestly don't know. I can't say.
>
> THE COURT: You are unsure. Okay.
>
> Do you think you can start right out the case--

> PROSPECTIVE JUROR [No. 31]: I could try. I certainly could.
>
> THE COURT: - - with the presumption of innocence?
>
> There is not anything wrong with having an impact, but is it whether, just the nature of the charges, you find so offensive, that - -
>
> PROSPECTIVE JUROR [No. 31]: No, no.
>
> THE COURT: - - you will not give the guy the benefit of the doubt?
>
> PROSPECTIVE JUROR [No. 31]: I would give him the benefit of the doubt until everything is presented, yes.

(App. 34-35)

After Juror No. 31 left the sidebar, the district court stated, "Well, I have to confess that, at first, I thought she was a go, but I am beginning to think - - I know you [defense counsel] have a different view of it - - but I think she could be fair." (App. 35) Thus, the district court refused to strike Juror No. 31 for cause. (App. 37) She was subsequently empanelled as the twelfth juror.

Allen was convicted on all counts of the indictment, and was sentenced to a term of incarceration of thirty (30) years in the Bureau of

Prisons. (App. 14-27) He appealed arguing that the district court abused its discretion denying his cause challenge to Juror No. 31.

Over a dissent by Judge Diane Wood, a two-judge majority of the Seventh Circuit panel concluded that the district court did not abuse its discretion in refusing to strike Juror No. 31 for cause. (App. 5-10) According to the majority, the district court was within its discretion to deny the cause challenge for three reasons. (App. 6)

First, the majority concluded that because Juror No. 31's experience was unrelated to Allen's case, the district judge was within his discretion to conclude that Juror No. 31 would give due weight to the evidence. (App. 6-7) Second, Juror No. 31 stated that she would give Allen "the benefit of the doubt" and not that she would merely try. (App. 7) The majority found nothing problematic with the fact that the "benefit of the doubt" statement was preceded by the district court's explanation that it was acceptable for the juror's prior experience to impact her. (App. 8) Finally, the majority concluded that because the district court had an opportunity to view Juror No. 31 in person, it was in a better position to gauge her confidence or tentativeness. (App. 9)

The majority did suggest that the district court could have been more explicit in its questioning, but concluded that because Juror No. 31 gave a "final and unequivocal statement that she would give Allen the benefit of the doubt" the district

court did not abuse its discretion in seating her on the jury. (*Id.*)

Judge Wood dissented. Judge Wood noted that Juror No. 31 "over and over again [ ] candidly admitted that it would be difficult for her to be fair, given her vivid recollection of the attempted kidnapping of her own daughter some years earlier." (App. 12) Judge Wood further explained that, despite the majority's conclusion otherwise, Juror No. 31 clearly found the attempted kidnapping to be very closely related to the charges Allen faced. (*Id.*)

Judge Wood concluded that Allen was denied his right to a fair and impartial jury because Juror No. 31 never offered an unequivocal assertion of impartiality. (App. 12-13) Juror No. 31's statement about "the benefit of the doubt" was not related to bias or impartiality. It was a statement about the burden of proof. And, such statement constituted an impermissibly lenient standard of proof. (App. 13) Lastly, Judge Wood expressed concern with the district court having advised Juror No. 31 that there was nothing wrong with the attempted kidnapping impacting her perception of Allen's case. (*Id.*) According to Judge Wood, "there is everything wrong with that." (*Id.*)

Allen petitioned for rehearing *en banc*. The petition was denied. (App. 28)

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE CONFLICT BETWEEN THE MAJORITY'S OPINION AND THE DECISIONS OF THIS COURT REQUIRING DISMISSAL OF A JUROR WHO EXPRESSES BIAS TOWARD THE DEFENDANT.

The Court should grant the writ to resolve the conflict between the majority's opinion and the decisions of this Court that have long held that a juror's inability to be impartial requires the dismissal of that juror. *See*, *Reynolds v. United States*, 98 U.S. 145 (1878); *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639 (1961). This Court's precedent has clearly established that a juror who expresses bias and partiality as to the issue to be tried cannot be seated as a juror in that trial. *Reynolds*, 98 U.S. at 155. The majority of the Seventh Circuit panel turned this principle on its head, concluding that despite repeated statements expressing bias and partiality, a statement related to the burden of proof could suffice to resurrect Juror No. 31 from dismissal for cause. This has never been the law, and this Court must intervene.

Over a century ago, in *Reynolds*, this Court recognized that, "[i]t is good ground for such a [cause] challenge that a juror has formed an opinion as to the issue to be tried." *Reynolds*, 98 U.S. at 155. As the *Reynolds* Court explained, "[t]he theory of the law is that a juror who has formed an opinion cannot

be impartial." *Id. Reynolds* leaves no room for the proposition that equivocal statements about bias can be supplanted by a statement directed at the burden of proof.

In *Irvin*, this Court reaffirmed the principles of *Reynolds*, that prospective jurors must be indifferent and impartial. The jurors in *Irvin* made various statements evidencing their bias, but yet each concluded that they could be fair and impartial. *Irvin*, 366 U.S. at 728. The *Irvin* Court held nonetheless that "[w]here so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight." *Id.*

The panel majority's decision here is in direct conflict with the holdings of both *Reynolds* and *Irvin*. Juror No. 31 over and over candidly admitted that she could not be fair to Allen based on the near abduction of her daughter, and the similar nature of the charges against Allen. And, unlike the jurors in Irvin, she never said she could be fair and impartial. The district court credited only her last statement that she would give Allen "the benefit of the doubt." The panel majority improperly deferred to the district court's "unique position" to conclude that this last statement wiped clean the juror's previously stated bias. But reliance on Juror No. 31's final statement that she would give Allen "the benefit of the doubt" had nothing whatsoever to do with her bias against him. As Judge Wood pointed out in her dissent, that statement related to the burden of proof. (App. 12) Moreover, as *Irvin* makes clear, where her bias was repeated so many times, Juror

No. 31's offer to give Allen the "benefit of the doubt" can be given only little weight.

The record is clear. Juror No. 31's statement regarding the "benefit of the doubt" came in response to the district court's question regarding the presumption of innocence. Acknowledging that the district court never obtained an affirmative response on the subject of laying aside her bias, the majority stated, "[w]e do not doubt that the trial judge's questioning of the prospective juror could have been more explicit in determining whether she would be able to 'set aside any opinion [she] might hold,' 'relinquish her prior beliefs,' or 'lay aside her biases or her prejudicial personal experiences.' " (App. 9) (internal citations omitted) The majority nonetheless concluded that her final statement regarding the "benefit of the doubt" sufficiently negated her prior statements of bias. But this conclusion runs afoul of *Irvin*, which counsels that little weight should be given to a purported statement of impartiality which is preceded by numerous statements evidencing bias. Indeed, this case is far more egregious than the facts of *Irvin*. Unlike the jurors in *Irvin*, Juror No. 31 never said she could be fair and impartial.

That the district court also informed Juror No. 31 that "[t]here is not anything wrong with [her daughter's experience] having an impact," exacerbates the failure to obtain an unwavering assurance of impartiality. (App. 35) In essence, rather than informing Juror No. 31 that she must set aside personal feelings to serve as a juror, the district court told Juror No. 31 that her bias was "ok." The majority opinion dismissed the district

court's misleading statement, concluding that Juror No. 31's bias must have been a "predisposition to find certain criminals heinous, not to find certain people criminals." (App. 7) Leaving aside the fact that Juror No. 31 never described her bias in that way, the finding of certain types of allegations so personally offensive that one cannot make rational decisions about them is exactly the sort of juror that must be excused for cause. Judge Wood's dissent explained this point perfectly:

> But there is everything wrong with [the district court's statement]. Her duty, as a juror, was to approach Allen's case without any predisposition. Allen has a right to a jury that did not include people who might, because they consider child abusers especially heinous, vote to convict Allen just because the evidence showed that *someone* was involved with child pornography.

(App. 13)

Bias is an inquiry separate from the burden of proof. A prospective juror may understand, and even agree with the burden of proof, and yet still be unfit to sit as a juror where her bias against certain offenders is great and based on personal experiences that cannot be set aside. "Impartiality is not a technical conception. It is a state of mind." *United States v. Wood*, 299 U.S. 123, 145, 57 S.Ct. 177 (1936).

This Court faced a similar distinction in *Irvin*. Juror No. 31 may well have understood the burden of proof but she was incapable of correctly applying it to Allen in this case due to her bias which she never said she could set aside. This Court should establish a clear line requiring that where a potential juror reveals a bias against a criminal defendant, the juror cannot be seated unless the juror unequivocally states that she can set her bias aside. This Court has in other situations determined that a clear line may be drawn in order to aid the lower courts in administering the justice system. *See, Maryland v. Shatzer*, 559 U.S. __, 130 S.Ct. 1213 (2010) (drawing a bright line rule allowing re-interrogation of a suspect after a fourteen day release from custody). Such a clear line is needed here. Failure to require an unambiguous statement of impartiality in the face of prior expressions of bias will render appellate review meaningless. Here, the panel majority deferred to the district court's unique position and allowed an ambiguous statement related to the burden of proof to serve as a statement of impartiality. But with nothing in the record to support such a finding, appellate review of for-cause challenges is impossible. A clear line, requiring an unambiguous statement of impartiality would solve this dilemma and provide appropriate guidance to courts and attorneys.

Because the district court seated a juror who should have been stricken for cause, a structural error has occurred, harmless error is not employed, and a new trial should have been granted. *See, Gray v. Mississippi*, 481 U.S. 648, 668, 107 S.Ct. 2045

(1987). This Court should grant the writ, and reverse the judgment of the Seventh Circuit.

II. THE COURT SHOULD GRANT THE WRIT BASED ON A CONFLICT BETWEEN THE MAJORITY'S OPINION AND THIS COURT'S OPINION IN *IN RE WINSHIP*.

Juror No. 31 stated only that she would give Allen "the benefit of the doubt." This is an impermissibly lenient burden of proof. As Judge Wood noted in her dissent, this Court has long held that the standard of proof needed to convict is "proof beyond a reasonable doubt." (App. 13, *citing*, *In re Winship*, 397 U.S. 358, 361-64, 90 S.Ct. 1068 (1970). The panel majority's opinion allowing Allen's conviction to stand based on a juror who only agreed to give Allen the "benefit of the doubt" rather than presume him innocent and hold the government to proof beyond a reasonable doubt conflicts with this Court's holding in *Winship*. The writ must be granted to correct this error.

In *Winship*, this Court noted that "it has long been assumed that proof beyond a reasonable doubt is constitutionally required." *Winship*, 397 U.S. at 362. The *Winship* Court went on to state that "[t]he [beyond a reasonable doubt] standard provides concrete substance for the presumption of innocence-that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' " *Id.* at 363, *quoting*, *Coffin v. United States*, 156 U.S. 432, 453, 15 S.Ct. 394 (1895).

As *Winship* makes clear, the history of the reasonable doubt standard is long. Moreover, it is a critical and indispensible aspect of the criminal justice system. *Id.* at 364. The "benefit of the doubt" is not a recognized standard, and certainly not as stringent as the reasonable doubt standard historically employed in this country's courts.

By allowing Juror No. 31 to serve on the jury based only on her willingness to give Allen the benefit of the doubt, the district court denied Allen his right to due process. When coupled with the fact that Juror No. 31 repeatedly expressed her bias against Allen based on the charge and her daughter's prior experience, Allen was denied his right to due process and an impartial jury. The Court should grant the writ to resolve the conflict between the panel majority's opinion and this Court's precedent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 2010

In the
United States Court of Appeals
For the Seventh Circuit

No. 09-2539

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM ALLEN,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 08 CR 238 – **Charles P. Kocoras**, *Judge.*

ARGUED APRIL 5, 2010 – DECIDED MAY 25, 2010

Before EASTERBROOK, *Chief Judge,* and BAUER and WOOD, *Circuit Judges.*

BAUER, *Circuit Judge.* William Allen appeals his conviction for advertising, transporting, and possessing child pornography in violation of 18 U.S.C. §§ 2251(d)(1)(A), 2252A(a)(1), and 2252A(a)(5)(B). He claims that the district court erred by denying his for-cause challenge to a prospective juror and by admitting into evidence portions of a chat log where he claimed to have committed other crimes. We have

reviewed the district court's rulings for an abuse of discretion. Finding no prejudicial error, we affirm.

I. BACKGROUND

Undercover FBI agent Kenneth Jensen logged into a chatroom and observed an advertisement for a file server, operated by someone calling himself "kidbot," that allowed people to trade child pornography with kidbot. Agent Jensen connected to kidbot's server, uploaded what was supposed to be an image of child pornography so that he could gain credit to download, and proceeded to download forty-two files before getting cut off, ostensibly because the image he had uploaded for credit was from the Hubble telescope, not child pornography. Three of the files he downloaded from kidbot showed a pre-pubescent girl engaging in sexual activity with an adult male.

Agents executed a warrant to search the home of William Allen's mother, the AT&T subscriber to whom kidbot's Internet Protocol address had been dynamically registered. They found Allen, who was twenty-one years old and living with his mother and siblings, alone in his bedroom with a desktop computer and other storage devices containing more than one thousand images of child pornography. They also discovered a log file on the desktop identifying the desktop as the file server to which Agent Jensen had connected, and chat logs where someone identifying himself as "William" and as a "21-year old male from Illinois" described how he used computers and

chatrooms to trade child pornography. In another chat log the agents discovered, Allen claimed to have molested minor children.

Allen was indicted for advertising, transporting, and possessing child pornography. During jury selection, prospective jurors completed a written questionnaire before appearing in court. The questionnaire asked whether anything would make it difficult for a prospective juror to be fair, to which one prospective juror replied "yes" because of an incident in which a man had attempted to kidnap her then six-year-old, now grown daughter. The judge then asked the prospective juror personally whether "that experience would somehow prejudice you against the defendant in this case?" The prospective juror replied, "Yes." App. A-3 at 139.

The judge then instructed her that "both sides are entitled to fairness and, actually, a clean slate in your mind, so that whatever exists in your past does not carry over and influence the decision in this case," and asked her once more whether she could be open-minded, perhaps set the experience aside, and give Allen the presumption of innocence. She replied that she could. App. A-3 at 140.

The judge then allowed Allen's attorney to perform follow-up questioning. He brought up the questionnaire and again asked the prospective juror whether "the nature of the charges alone would make it difficult for you to be fair to both parties." Again, she replied, "Yes," indicating that she didn't know

whether she would start the case by giving Allen the presumption of innocence. App. A-3 at 141-42.

The judge again instructed her, "There is not anything wrong with having an impact, but it is whether, just the nature of the charges, you find so offensive that you will not give the guy the benefit of the doubt?" She replied, "I would give him the benefit of the doubt until everything is presented, yes." She was questioned no further. App. A-3 at 142.

Allen had used all of his peremptory challenges so he objected that the prospective juror should be stricken for cause. The judge disagreed and allowed her to be seated as the twelfth member of the jury.

The jury found Allen guilty and the district court sentenced him to thirty years in prison. Allen does not argue that thirty years in prison for a twenty-one-year-old first-time offender who never left his mother's home is constitutionally excessive. *Cf. Graham v. Florida*, No. 08-7412 (U.S. May 17, 2010) (vacating a term-of-years sentence as categorically unconstitutional); *Solem v. Helm*, 463 U.S. 277 (1983) (vacating a term-of-years sentence because it was unconstitutional as applied to the facts of the case). Rather, he limits his appeal to the district court's seating of the prospective juror and to the admission into evidence of the chat log portions where he claimed to have molested minors.

II. DISCUSSION

A. Denial of For-Cause Challenge to Prospective Juror

We review Allen's claim that the district court erroneously denied his for-cause challenge for an abuse of discretion. *See, e.g., Thompson v. Altheimer & Gray,* 248 F.3d 621, 624-25 (7th Cir. 2001); *United States v. Nelson,* 277 F.3d 164, 201 (2d Cir. 2002). In reviewing denials of challenges for cause, we "accord great deference to the judgment of the experienced trial judge based on his unique opportunity to assess the credibility of the jurors during voir dire examination, as well as their demeanor throughout the course of the trial." *United States v. Nururdin,* 8 F.3d 1187, 1190 (7th Cir. 1993) (quoting *United States v. Barnes,* 909 F.2d 1059, 1070-71 (7th Cir. 1990)); *accord Wainwright v. Witt,* 469 U.S. 412, 428 (1985); *see also Thompson v. Keohane,* 516 U.S. 99, 111 (1995) (according "special deference"); *Nelson,* 277 F.3d at 201-02 ("There are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse, than in ruling on challenges for cause in the empaneling of a jury.") (quoting *United States v. Ploof,* 464 F.2d 116, 118 n.4 (2d Cir. 1972)).

The Constitution guarantees criminal defendants "due process of law" and the right to "an impartial jury." U.S. Const. amends V, VI. These mandates are satisfied, when seating a prospective juror despite a party's for-cause challenge, if the prospective juror

has given final, unequivocal assurances, deemed credible by the judge, that for purposes of deciding the case, she can "set aside any opinion [she] might hold," *Patton v. Yount,* 467 U.S. 1025, 1036 (1984), "relinquish her prior beliefs," *Thompson,* 248 F.3d at 626, or "lay aside her biases or her prejudicial personal experiences," *United States v. Gonzalez,* 214 F.3d 1109, 1114 (9th Cir. 2000). *See Thompson,* 248 F.3d at 626 (collecting cases).

The district court was within its discretion to find that the prospective juror gave final, unequivocal, and credible assurances that she could set aside any bias she might have stemming from the kidnapping attempt on her daughter and decide the case on the evidence, for three reasons.

First, the unrelatedness of Allen's case and of the kidnapping attempt suggest that any bias was minimal compared with other cases in which the trial judge determined the juror's ability to overcome bias. In *Thompson,* where the ultimate issue was the spuriousness of the employee's claim, the prospective juror manifested a belief, based on his experience as an employer, "that some claims against employers are spurious." *Thompson,* 248 F.3d at 626. The relationship between the case's ultimate issue and juror's prior experience was precise coincidence, thus forming a strong bias or predisposition to find against a certain party. *See also Gonzalez,* 214 F.3d at 1112 (finding implied bias where the juror "had some personal experience that is similar or identical to the fact pattern at issue").

But here the prospective juror's prior experience was wholly unrelated to whether Allen committed the crimes for which he was indicted, much less any specific evidentiary issues such as Allen's state of mind or the identity of kidbot. The prospective juror's predisposition in this case – having personally experienced the attempted molestation of her daughter and the effect it must have had on her daughter, herself, and her entire family – was to find those who commit crimes against children particularly heinous. This belief has nothing to do with whether any particular defendant is guilty of committing crimes against children. Moreover, the crime here involved child pornography, not kidnapping. As the prospective juror acknowledged, "this crime has nothing to do with that crime." App. A-3 at 140. Neither at voir dire nor on appeal has Allen's counsel been able to explain how the prospective juror's experience related directly to the issues in this trial in such a way that the district court was beyond the bounds of its discretion to find the prospective juror able to weigh the evidence impartially. For this reason, we give particular deference to the district court's finding that the prospective juror would "give due weight to the evidence." *Thompson*, 248 F.3d at 626.

Second, the prospective juror stated finally that she would "suspend judgment until she ha[s] heard all the evidence," *id.*, when she informed the court in her last statement during voir dire that she "would give him the benefit of the doubt until everything is presented." She told the judge what she would do, not

that she would merely "try," *Gonzalez*, 214 F.3d at 1111, and we do not find this statement equivocal simply because the question to which it responded was preceded by the judge saying that "[t]here is not anything wrong with [the kidnapping attempt] having an impact." Any impact of the kidnapping attempt, as we have said, went to the prospective juror's predisposition to find certain criminals heinous, not to find certain people criminals, and in any event was related only tangentially to Allen's crimes. Nor, on this cold record, will we overturn the determination, by the sole judge who was present, that the prospective juror's final, unequivocal assurance was credible. Prior equivocating or wavering is hardly dispositive in assessing credibility, as "[j]urors . . . cannot be expected invariably to express themselves . . . consistently." *Patton*, 467 U.S. at 1039. Indeed, other factors may indicate which of a prospective juror's two opposed sets of statements is more credible, such as which was "least influenced by leading." *Id.* Here the judge found that any statements indicating bias were a result of Allen's counsel "pushing her. You pushed her in another direction." App. A-3 at 143. Furthermore, the paper record does not reveal the relative pushiness of the prospective juror's questioners. Nor does it reveal on which of her opposing sets of statements the prospective juror varied her emphasis, in terms of volume, inflection, or demeanor. A district court's findings concerning actual bias are "based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." *Wainwright v. Witt*, 469 U.S. 412, 428

(1985). Because appellate judges are absent from voir dire, when a prospective juror fails to express herself "carefully or even consistently . . . it is [the trial] judge who is best situated to determine competency to serve impartially." *Patton,* 467 U.S. at 1039.

Finally, the trial judge was in the best position to gauge the prospective juror's ability to "follow[ ] [his] instructions." *Thompson,* 248 F.3d at 626. Both times the judge instructed the prospective juror on the burden of proof, he elicited a response indicating that she would presume Allen innocent. Moreover, the paper record does not reveal the relative confidence or tentativeness of these responses, which only the trial judge was able to examine.

We do not doubt that the trial judge's questioning of the prospective juror could have been more explicit in determining whether she would be able to "set aside any opinion [she] might hold," *Patton,* 467 U.S. at 1036, "relinquish her prior beliefs," *Thompson,* 248 F.3d at 626, or "lay aside her biases or her prejudicial personal experiences." *Gonzalez,* 214 F.3d at 1114. Nevertheless – given the relatively minimal bias the prospective juror must have had toward finding this particular defendant guilty, her final and unequivocal statement that she would give Allen the benefit of the doubt until the close of trial, and her demonstrated ability to follow the judge's instructions – we hold that the district court was within its discretion to find that the prospective juror's prior experience would not impede her ability to decide the case fairly. So we

find no violation of Allen's rights to due process and to an impartial jury.

B. Admission of Chat Log Portions

We move to the admission of the chat log portions where Allen claimed to have molested minors. Even were it error, under Federal Rule of Evidence 403, for the district court to admit them, the error was harmless because the government presented plenty of other evidence cumulative of the proper purposes for which they otherwise may have been admitted – to prove identity, knowledge, and intent. Fed. R. Evid. 404(b); *see also United States v. Sebolt,* 460 F.3d 910, 917 (7th Cir. 2006).

To prove identity, for example, the government found a plethora of child pornography on Allen's desktop computer and elsewhere in his room, a log file on the desktop indicating it had been used to transport child pornography to Agent Jensen, explicit advertisements posted by Allen, other chat log portions where Allen discussed trading child pornography, and an abundance of information freely available online linking Allen's identity to the various nicknames he used when engaging in these chats. FBI agents testified to these items at trial and some were admitted into evidence physically.

The government also presented other evidence to prove Allen's knowledge and intent. For example, in other chat log portions, Allen stated "nah im just trading under age porn" or "yeah well I love all little

boy porn." Appellant's Br. at 25. And as Allen admits, this evidence was "equally capable of proving" knowledge and intent. *Id.*

Moreover, even were there a remaining harmful effect of admitting Allen's discussion of separate crimes, it was additionally limited when the judge gave an instruction specifically admonishing the jury to consider "evidence of acts of the defendant other than those charged in the indictment . . . only on the questions of the identity of the defendant as the individual who committed the charged acts; and, motive, intent, preparation, knowledge and absence of mistake or accident." Appellee's Br. at 25 (quoting Tr. at 469).

For these reasons, we need not decide whether the danger of unfair prejudice or the needless presentation of cumulative evidence substantially outweighed the chat log portion's probative value. Even if they did, the prosecution's case would not have been "significantly less persuasive had the improper evidence been excluded." *United States v. Cooper*, 591 F.3d 582, 590 (7th Cir. 2010) (citations omitted).

III. CONCLUSION

Allen's claim that the district court improperly denied his for-cause challenge to a prospective juror fails because he provides no argument to convince us that the district court abused its discretion in finding that the prospective juror would act impartially. His claim that the district court improperly admitted his

discussion of molesting minors fails because even had it not been admitted, the government presented a mountain of other evidence to convict him. Therefore, we AFFIRM.

WOOD, *Circuit Judge*, dissenting. I regret that I cannot join my colleagues' assessment of the district court's decision to permit Juror 31 to sit on the jury that heard William Allen's case. As the court's opinion recounts, over and over again Juror 31 candidly admitted that it would be difficult for her to be fair, given her vivid recollection of the attempted kidnapping of her own daughter some years earlier. Although the majority suggests that this event was unrelated to the child pornography charges involved in Allen's case, *ante* at 6, Juror 31 herself saw a close link between the two situations and properly alerted the judge to her views. On its face, this reveals the kind of inability to be neutral that has always been understood to require the dismissal of a juror. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 155 (1878) (removal of a juror is appropriate if "a juror has formed an opinion as to the issue to be tried"). If a court mistakenly seats a juror who should have been struck for cause, the error is a structural one, and a new trial is required. *Gray v. Mississippi*, 481 U.S. 648 (1987).

Two aspects of the record reinforce my view that Allen is entitled to a new trial under these principles. First, Juror 31 never offered an unequivocal assertion

of impartiality. See *Thompson v. Altheimer & Gray*, 248 F.3d 621, 627 (7th Cir. 2001). The best she could manage was the statement that she "would give [Allen] the benefit of the doubt until everything is presented. . . ." "The benefit of the doubt" is not the same thing as impartiality – why should the government want a trial before a juror who has put a thumb on the defendant's side of the scale, if that is what she meant – and if the juror's statement is understood as an attempt at promising to hold the government to its burden of persuasion, it states an impermissibly lenient standard. "The benefit of the doubt," after all, is quite different from "proof beyond a reasonable doubt." *In re Winship*, 397 U.S. 358, 361-64 (1970). Second, Juror 31's offer to give Allen the benefit of the doubt occurred only after the court had misleadingly told her that "there [was] not anything wrong with [the kidnapping attempt] having an impact" on her perception of Allen's case. But there is everything wrong with that. Her duty, as a juror, was to approach Allen's case without any predisposition. Allen has a right to a jury that did not include people who might, because they consider child abusers especially heinous, vote to convict Allen just because the evidence showed that *someone* was involved with child pornography.

For these reasons, I respectfully dissent.

UNITED STATES DISTRICT COURT

NORTHERN District of ILLINOIS

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	Case Number: 08 CR 238-1
WILLIAM B. ALLEN	USM Number: 40198-424
	Harold M. Garfinkel
	Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) 1, 2 and 3 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18:2251(d)(1)(A)	Making and Publishing a Notice and Advertisement Seeking and Offering to Receive, Exchange, Display, and Distribute Visual Depictions of Minors Engaging in Sexually Explicit Conduct	04/12/2006	1

18:2252A(a)(1)	Transporting or Shipping Child Pornography	04/12/2006	2
18:2252A(a)(5)(B)	Possessing Materials Containing Images of Child Pornography Shipped and Produced Using Materials in Interstate Commerce	09/13/2006	3

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

June 9, 2009
Date of Imposition of Judgment

/s/ Charles P. Kocoras
Signature of Judge

CHARLES P. KOCORAS,
U.S. District Court Judge
Name and Title of Judge

June 9, 2009
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **THREE HUNDRED SIXTY (360) MONTHS** as follows:

THREE HUNDRED SIXTY (360) MONTHS on Count 1; **SIXTY (60) MONTHS** on Count 2; and **ONE HUNDRED TWENTY (120) MONTHS** on Count 3. Said sentencing of imprisonment on each of Counts 1, 2 and 3 to run concurrently with each other for a total term of imprisonment of **THREE HUNDRED SIXTY (360) MONTHS**.

X The court makes the following recommendations to the Bureau of Prisons:

Butner, NC

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐at _____ ☐ a.m. ☐ p.m. on _____.

☐as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐before 2 p.m. on _____

☐as notified by the United States Marshal.

☐as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY
UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **LIFE**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

X The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use distribute, or administer any controlled substance, or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While on supervised release, the defendant shall not commit another federal, state or local crime, shall comply with the standard conditions that have been adopted by this Court, and shall comply with the following additional conditions:

1. The defendant shall comply with the requirements of the Computer and Internet Monitoring Program as administered by the U.S. Probation Office. The defendant shall consent to the installation of computer monitoring software on all identified computers to which the defendant has access. The software may restrict and/or record any and all activity on the computer, including the capture of keystrokes, application information, Internet use history, email correspondence, and chat conversations. A notice will be placed on the computer at the time the installation to warn other users of the existence of the monitoring software. The defendant shall not remove, tamper with, reverse engineer, or in any way circumvent the software. The costs of the monitoring software shall be paid by the defendant.

2. The defendant shall register with the state sex offender registration agency in any state where he resides, is employed, carries on a vocation, or is a student, as directed by the probation office.

3. The defendant shall not possess or use a computer, camera, or any device with access to any "online computer service" at any location (including place of employment) without prior

approval of the probation officer. This includes any Internet service provider, bulletin board system, or any other public or private network or email system. The defendant shall not possess camera phones or electronic devices that could be used for covert photography without the prior approval of the probation officer.

4. The defendant shall not possess or have under his control any pornographic, sexually oriented, or sexually stimulating materials, including visual, auditory, telephonic, or electric media, computer programs, or services. The defendant shall not patronize any place where such material or entertainment is available. The defendant shall not use any sex-related telephone numbers.

5. The defendant shall not have contact with any person under the age of 18, except in the presence of a responsible adult who is aware of the nature of his background and current offense, and who has been approved by the probation officer and treatment provider.

6. The defendant's employment shall be restricted to the district and division where he resides and/or is supervised, unless approval is granted by the probation officer. Prior to accepting any form of employment, the defendant shall seek the approval of the probation officer, in order to allow the probation officer the opportunity to access the level of risk to the community the defendant will pose if employed in a particular capacity. The defendant shall not participate in any volunteer activity that may cause the defendant to come into direct contact with children except under the

circumstances approved in advance by the defendant's probation officer and treatment provider.

7. The defendant shall provider [sic] his supervising probation officer with copies of his telephone bills, all credit card statements/receipts, and any other financial information requested.

8. The defendant shall participate in a mental health and/or sex offender treatment program as directed by the probation officer. The defendant shall comply with all recommended treatment which may include psychological and physiological testing. The defendant shall maintain use of all prescribed medications.

9. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and random drug tests thereafter, conducted by the U.S. Probation Office, not to exceed 104 tests per year.

10. The defendant shall not possess a firearm or destructive device.

11. Upon completion of the defendant's term of incarceration, payment of any fine balance shall become a condition of supervised release, payable at a rate of at least 10% of his monthly income.

12. The defendant shall submit to the collection of a DNA sample from the defendant at the direction of the U.S. Probation Office if the collection of such a sample is authorized.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 300.00	$ 3,000.00	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. 3664(i), all non-federal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$ _____	$ _____	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A X Lump sum payment of $ 3,300.00 due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D or, ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties:

Upon completion of the defendant's term of incarceration, payment of any fine and special assessment balance shall become a condition of supervised release, payable at a rate of at least 10% of his monthly income.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 4, 2010

Before

FRANK H. EASTERBROOK, *Chief Judge*

WILLIAM J. BAUER, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

No. 09-2539

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM ALLEN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 08 CR 238

Charles P. Kocoras, *Judge*.

ORDER

On June 8, 2010, defendant-appellant filed a petition for panel rehearing with suggestion for rehearing *en banc*. On June 24, 2010, an Answer was filed by plaintiff-appellee. No judge in active service has requested a vote on the petition for rehearing *en banc*, and all of the judges on the original panel have voted to deny the petition for panel rehearing. It is, therefore, **ORDERED** that the petition for panel rehearing with suggestion for rehearing *en banc* is **DENIED**.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM B. ALLEN, Defendant.	)	Docket No. 08 CR 238 Chicago, Illinois December 8, 2008 10:30 o'clock a.m.

VOLUME ONE
TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE CHARLES P.
KOCORAS, AND A JURY

APPEARANCES:

For the Plaintiff:	HON. PATRICK FITZGERALD United States Attorney BY: MR. CLIFFORD C. HISTED MS. CAROL A. BELL 219 S. Dearborn St., Suite 500 Chicago, Illinois 60604
For the Defendant:	LAW OFFICES OF HAL GARFINKEL BY: MR. HAROLD MARK GARFINKEL 111 West Washington, Suite 1301 Chicago, Illinois 60602
Also Present:	S/A WESLEY TAGTMEYER, FBI

Court Reporter: MS. JOENE HANHARDT
Official Court Reporter
219 S. Dearborn Street,
Suite 1744-A
Chicago, Illinois 60604
(312) 435-6874

* * *

PROCEEDINGS RECORDED BY
MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED BY COMPUTER

* * *

Jury Selection

[138] So, now, if you will bear with us, we are going to repeat the process and try and not make it so laborious of following up on some questionnaires of private or otherwise sensitive material.

So, if you will indulge us just a little bit longer, we will be with you as soon as we can.

And thank you.

(Whereupon, the following further proceedings were had at sidebar, out of the hearing of the jury, to wit:)

THE COURT: Does anybody need a break?

(Whereupon, a number of jurors indicated in the affirmative.)

THE COURT: All right. We will take a 15-minute recess. Take a break. There are facilities on either end. And when you come back here, resume the

places you are in, in the jury box, and the rest of you back in the well of the courtroom. Okay?

(Brief recess.)

(Whereupon, the following further proceedings were has [sic] at sidebar, out of the hearing of the jury, to wit:)

THE COURT: [No. 31]?

(Whereupon, Prospective Juror [No. 31] came to sidebar.)

THE COURT: Hi.

PROSPECTIVE JUROR [No. 31]: Hi.

[139] THE COURT: I know you had an unfortunate incident and you talked about it.

PROSPECTIVE JUROR [No. 31]: Yes.

THE COURT: Was this a carjack –

PROSPECTIVE JUROR [No. 31]: With my daughter.

She was six years old and was walking home with another girl from school and the man was standing in front of a tavern and said something to them. And they ran off and he jumped into his car and tried to cut them off. They were running to the girl's house. This was a house on the alley.

He cut them off and proceeded to jump out after them, swore at them, told them to get in the car and he had some of his clothes off. So, it is sensitive.

MR. GARFINKEL: It is.

THE COURT: Well, I know that had notl ing to with this, but sometimes things will have a impact.

Do you think that experience would someho prejudice you against the defendant in this case?

PROSPECTIVE JUROR [No. 31]: Yes.

THE COURT: You think so?

PROSPECTIVE JUROR [No. 31]: I can't l positive one way or the other. I don't know how would react to it, being a touchy situation to beg with.

THE COURT: Well, you know, both sid are entitled to –

[140] PROSPECTIVE JUROR [No. 31]: Ye

THE COURT: – fairness and, actually, clean slate in your mind, so that whatever exists your past does not carry over and influence –

PROSPECTIVE JUROR [No. 31]: Right.

THE COURT: – the decision in this case.

PROSPECTIVE JUROR [No. 31]: Right, rigl

THE COURT: So, you have some troubl you think, with that?

PROSPECTIVE JUROR [No. 31]: I certain would try to be open-minded.

THE COURT: Do you think you could be?

PROSPECTIVE JUROR [No. 31]: I could be.

THE COURT: And perhaps set that experience aside?

PROSPECTIVE JUROR [No. 31]: Yes.

THE COURT: This crime has nothing to with that crime.

PROSPECTIVE JUROR [No. 31]: Right.

THE COURT: So, it is a young man charged with certain crimes. He has pled not guilty. He is entitled to the presumption of innocence.

Do you think you could give him that?

PROSPECTIVE JUROR [No. 31]: I think I could.

THE COURT: All right.

MR. HISTED: Nothing further.

THE COURT: Anything?

[141] MR. GARFINKEL: I do.

[No. 31] –

PROSPECTIVE JUROR [No. 31]: [No. 31].

MR. GARFINKEL: [No. 31].

Question 25 on the questionnaire asked whether or not the nature of the charges would make it hard to be fair, and you said, "Yes," because of the past experience you had with your daughter, both in terms

of, it sounds like, some kind of vehicle carjacking and the attempted kidnapping.

PROSPECTIVE JUROR [No. 31]: Yes.

MR GARFINKEL: So, I am going to ask you – I don't want to lead you at all – would it be difficult, based on that past experience, for you to be fair and impartial?

PROSPECTIVE JUROR [No. 31]: With the past experience, I don't know; but, the circumstances that he said for trial bothers me personally, with having children and a little girl.

MR. GARFINKEL: So, the charges – the child pornography – just the nature of the charges alone would make it difficult for you to be fair to both parties?

PROSPECTIVE JUROR [No. 31]: Yes, it would. I am sorry, it would.

THE COURT: Does the charges themselves – would you start out one way or the other?

PROSPECTIVE JUROR [No. 31]: I would – I don't know [142] if I – I don't know. I honestly don't know. I can't say.

THE COURT: You are unsure. Okay.

Do you think you can start right out the case –

PROSPECTIVE JUROR [No. 31]: I could try. I certainly could.

THE COURT: – with the presumption of innocence?

There is not anything wrong with having an impact, but is it whether, just the nature of the charges, you find so offensive, that –

PROSPECTIVE JUROR [No. 31]: No, no.

THE COURT: – you will not give the guy the benefit of the doubt?

PROSPECTIVE JUROR [No. 31]: I would give him the benefit of the doubt until everything is presented, yes.

THE COURT: All right.

Well, you strike me as a fair-minded person.

PROSPECTIVE JUROR [No. 31]: Thank you.

THE COURT: We will take all of your answers into consideration. Okay?

PROSPECTIVE JUROR [No. 31]: Okay.

Thank you.

THE COURT: Thank you very much.

MR. GARFINKEL: Thank you, [No. 31].

(Prospective Juror [No. 31] left the sidebar.)

THE COURT: Well, I will have to confess that, at [143] first, I thought she was a go, but I am beginning to think – I know you have a different view of it – that I think she could be fair.

MR. HISTED: She was very clear that she understands the job and that she is willing to do it.

THE COURT: I think they cut her daughter off. They were going right from school.

MR. GARFINKEL: Judge, she made it very clear the nature of the charge being what it is, would cause her to not be able to be fair. She said that. I heard her.

THE COURT: She said a lot of things. I mean –

MR. GARFINKEL: I don't mean to follow up because I didn't want to certainly belabor your time.

THE COURT: Well, I realize there is an argument here, but I personally – people do not give you one answer and that stands out to the exclusion of everything she said.

And she has repeated at least twice, if not three times, that she thinks she could be fair.

I know you were pushing her. You pushed her in another direction.

MR. GARFINKEL: In 30 seconds she equivocated three times.

THE COURT: It all depends whether the last one you talked to –

MR. GARFINKEL: Judge, I would ask for cause.

[144] THE COURT: I am not taking her off.

MR. GARFINKEL: Judge, come on. She has equivocated three times. This woman is –

THE COURT: I have an open mind about this woman. Gary Tice?

(Whereupon, Prospective Juror Tice came to sidebar.)

* * *

CONFIDENTIAL QUESTIONNAIRE

1. Full Name: [No. 31] [redacted]

2. Cities or suburbs where you have lived for the last ten years:

   Chicago, Norridge

3. Do you own your home or rent it? own home

4. State the highest level of education you completed; state where you attended high school and where you earned your degree(s), if any.

   Amundsen High School, Illinois

5. State your occupation, name of your employer, and number of years employed there (if retired, please describe your last employment):

   Claims Adjuster, Bankers Life and Casualty –

   13 years

6. What other jobs have you had during your working life?

   Clerk in Business Office of Medical Center, many

   years of volunteer work and neighborhood schools.

7. If you are married, describe your spouse's occupation, employer, and number of years (if spouse is retired, describe past employment):

   My husband is a produce manager for Dominicks for about 30 years.

8. If you have any grown children, please describe their occupations:

   Son, Union Carpenter in New York

   Daughter – CNA/Student Chgoland

9. Employment information concerning others who live with you (for example, parents, roommates):

   N/A

10. Have you or any of your close friends or family members been employed in law enforcement or a security-related job? If yes, identify the individual(s) and the position(s) held:

    yes, friends are police in Chgoland – Jimmy Capicous

    cousin is an FBI agent – Kurt Ettelt

11. Have you or any close friends or family members been arrested or convicted for an offense other than a minor traffic offense? If yes, please describe the incident:

    yes, nephew Adam Burgess convicted of breaking & entering when he was a jevinal [sic]

12. Have you or any of your close friends or family members ever been the subject of a criminal investigation? If so, please explain briefly.

Not that I am aware of.

13. Have you or any of your close friends or family members ever been a victim of a crime? If so, what were the circumstances?

yes, my daughter attempted kidnapping when she was 6 years old also, our car was stolen

14. Have you your spouse or anyone close to you ever been the victim of sexual abuse? If so, please explain briefly.

A man, Ronald Norton attempted to kidnap my daughter and her friend.

15. Have you or any close friends or family members ever been accused of involvement with child pornography? If so, please describe.

no

16. Do you have any legal training or experience? Are any of your close friends or family members attorneys who specialize in criminal law? If the answer to either of these questions is yes, please explain briefly.

no

17. Have you or any close friends or family members been involved in a lawsuit as a party or witness? If so, please describe briefly.

yes – from my brother-in law –workmans comp. case

18. This case involves an investigation by the Federal Bureau of Investigation. Have you had any experiences or attitudes regarding this law enforcement agency, or any other law enforcement agency, that might make it difficult for you to be fair to both sides in this case? If so, please explain.

no

19. Have you or any close friends or family members ever had a legal dispute with the federal government? If so, please describe.

not that I'm aware of

20. What sources of news, if any, do you read, listen to, or watch on a regular basis?

I read the paper, listen to television and radio

21. What do you enjoy doing in your spare time?

surffing [sic] the internet

22. Have you ever served on a jury before? If so, state when, where, and whether the jury reached a verdict.

no

23. Do you have any religious beliefs or affiliations that might interfere with your ability to be fair?

no

24. Jury duty is an important responsibility of citizenship. Is there anything in your schedule in the next few days that would make it impossible for you to serve on this jury? If so, please describe.

no

25. Is there anything about the nature of the charges in this case that would make it hard for you to be fair?

yes – because of the past experience my daughter went through

26. Is there anything else that might make it difficult for you to be fair to either the government or the defendant in this case? If so, please explain.

yes, because of my daughter

No. 10-594

In the Supreme Court of the United States

WILLIAM ALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in refusing to strike a juror for cause.

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In the Supreme Court of the United States

No. 10-594

WILLIAM ALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 605 F.3d 461.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 2010. Pet. App. 1. A petition for rehearing was denied on August 4, 2010 (Pet App. 28). The petition for a writ of certiorari was filed on November 2, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of offering to receive or exchange child pornography, in violation of 18 U.S.C. 2251(d)(1)(A);

transporting or shipping child pornography, in violation of 18 U.S.C. 2252A(a)(1); and possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). Pet. App. 1, 14-15. He was sentenced to 360 months of imprisonment, to be followed by a lifetime of supervised release. *Id.* at 4, 16-17. The court of appeals affirmed. *Id.* at 1-13.

1. On April 12, 2006, a Federal Bureau of Investigation (FBI) agent investigating child exploitation logged into a chat room and saw advertisements posted by petitioner offering to exchange child pornography. Pet. App. 2; Gov't C.A. Br. 2. Petitioner, using the handle "kidbot," offered access to a file server containing "New Pics/Vids Mostly Girls Few Boys 10-15," and "New Vids Girls only 10-15 NO NON-NUDE." *Id.* at 2-3. Petitioner's advertisements ran more than 300 times during the agent's April 12, 2006 session, and other users connected or attempted to connect to the file server nearly 200 times that day. *Id.* at 3. The agent, following the instructions in petitioner's advertisement, connected to the server, uploaded a file containing a corrupted image to obtain credit to download, and downloaded images showing pre-pubescent girls engaging in sexual activity with adult males. Pet. App. 2; Gov't C.A. Br. 3.

The FBI determined that "kidbot" was using an Internet Protocol address registered to petitioner's mother. Pet. App. 2. The FBI obtained and executed a warrant to search her house. *Ibid.* The agents found petitioner, who was 21 years old and living at his mother's house, in his bedroom with a desktop computer and other storage devices containing more than a thousand images of child pornography. *Ibid.* Petitioner's computer also contained a log file identifying it as the file server from which the agent had downloaded child por-

nography. *Ibid.* The agents found chat logs on petitioner's computer, in which petitioner identified himself as "William" and as a "21-year old male from Illinois." *Ibid.* In the chats, petitioner described how he used chat rooms to obtain and trade child pornography, and he also stated that he had molested children. *Id.* at 2-3; Gov't C.A. Br. 6.

2. A grand jury in the Northern District of Illinois returned an indictment charging petitioner with one count of offering to receive or exchange child pornography, in violation of 18 U.S.C. 2251(d)(1)(A); one count of transporting or shipping child pornography, in violation of 18 U.S.C. 2252A(a)(1); and one count of possessing of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B).

During jury selection, Juror 31, in response to an item on the questionnaire asking whether anything would make it difficult for her to serve as a fair juror, disclosed that her then six-year-old daughter, who was now grown, had been a victim of an attempted kidnapping. Pet. App. 3, 40. The judge asked the juror whether that experience would somehow prejudice her against the defendant. *Id.* at 3, 32. She initially responded "Yes," but then stated "I can't be positive one way or the other. I don't know how I would react to it, being a touchy situation to begin with." *Id.* at 32.

The judge explained that "both sides are entitled to fairness and, actually, a clean slate in your mind, so that whatever exists in your past does not carry over and influence the decision in this case." Pet. App. 3, 32. The judge asked Juror 31 whether she could be open-minded, and she said that she could. *Id.* at 3, 32-33. The judge then asked whether she could perhaps set her experience aside, and the juror said, "Yes." *Id.* at 3, 33.

The judge explained that petitioner was "entitled to the presumption of innocence" and asked the juror whether she could give petitioner that presumption. *Ibid.* She replied, "I think I could." *Ibid.*

The judge then allowed petitioner's counsel to ask additional questions. Pet. App. 3. Counsel referred to the juror's answer on the questionnaire and again asked her whether the "nature of the charges" and her "past experience" would make it difficult for her to be fair. *Id.* at 3, 33-34. Juror 31 responded that she didn't know, but that, in light of her past experience, the "circumstances" of the trial "bother[ed her] personally, with having children and a little girl." *Id.* at 34. Counsel again asked, "So the charges—the child pornography—just the nature of the charges alone would make it difficult for you to be fair to both parties?" *Ibid.* Juror 31 initially replied that it would, and then she indicated she was unsure. *Id.* at 3-4, 34-35. The judge then explained, "There is not anything wrong with having an impact, but it is whether, just the nature of the charges, you find so offensive that you will not give the guy the benefit of the doubt?" *Id.* at 4, 35. Juror 31 responded, "I would give him the benefit of the doubt until everything is presented, yes." *Ibid.* The judge said, "You strike me as a fair-minded person." *Id.* at 35.

Over petitioner's objection, the district court refused to strike Juror 31 for cause and allowed her to be seated as the twelfth juror. Pet. App. 4. The judge explained that although he initially thought that Juror 31 should be excused, the colloquy as a whole led him to conclude that she could be fair. *Id.* at 35-36. The court indicated that the juror's equivocal statements were caused by defense counsel "push[ing] her in another direction." *Id.* at 36. Petitioner's counsel renewed his objection the

following day, and the judge stated that, following the colloquy, he "became firmly convinced * * * that she could be a fair and impartial juror." Gov't C.A. Br. 11-12. The jury convicted petitioner on all counts. Pet. App. 4.

3. The court of appeals affirmed. Pet. App. 1-13. As relevant here, the court concluded that the district court did not abuse its discretion in refusing to strike Juror 31 for cause. The court noted that a prospective juror may be seated, despite a party's for-cause challenge, if the juror has given "final, unequivocal assurances" that, in deciding the case, the juror can "set aside any opinion [she] might hold." *Id.* at 6 (quoting *Patton* v. *Yount*, 467 U.S. 1025, 1036 (1984)). In considering that question, the court accorded "great deference to the judgment of the experienced trial judge" who had the "unique opportunity to assess the credibility of the jurors." *Id.* at 5 (quoting *United States* v. *Nururdin*, 8 F.3d 1187, 1190 (7th Cir. 1993)).

The court concluded that the district court was "within its discretion" to find that Juror 31 gave "final, unequivocal, and credible assurances that she could set aside any bias" arising from her daughter's attempted kidnapping. Pet. App. 6. The court reasoned that any relevant bias Juror 31 may have held was "relatively minimal," *id.* at 9, because the attempted kidnapping of the juror's daughter "related only tangentially" to petitioner's child pornography crimes and the specific issues in the case. *Id.* at 8. The court further stated that Juror 31 explicitly recognized as much when she agreed that "this crime has nothing to do with that crime." *Id.* at 7. The court also concluded that the juror's statement that she would give petitioner the benefit of the doubt was sufficiently final and unequivocal. *Id.* at 8. The court of

appeals credited the district court's conclusion that the juror's earlier, equivocal statements were caused by defense counsel's "pushing." *Ibid.* Finally, the court of appeals noted that Juror 31 demonstrated an ability to follow the court's instructions by twice stating, in response to the district court's instructions, that she would give petitioner the presumption of innocence. *Id.* at 9.

Judge Wood dissented. In her view, Juror 31's admission that "it would be difficult for her to be fair," combined with her failure to offer "an unequivocal assertion of impartiality," required the juror's dismissal. Pet. App. 12-13. Judge Wood noted that the juror's assurance that she would give petitioner the "benefit of the doubt" was insufficient because it suggested a more lenient standard than proof beyond a reasonable doubt, and because the statement was made in response to the district court's "misleading[]" statement that there was "not anything wrong" with the juror's prior experience "having an impact" on her perception of the case. *Id.* at 13.

DISCUSSION

Petitioner contends (Pet. 9-15) that the district court abused its discretion in refusing to excuse Juror 31 for cause. The court of appeals correctly rejected that contention, and the court's fact-bound ruling does not conflict with any decision of this Court or of another court of appeals. Further review is unwarranted.

A district court must excuse for cause any prospective juror who would be unable to render an impartial verdict. See 28 U.S.C. 1866(c)(2). The court need not excuse a juror for cause, however, if the juror indicates an ability to lay aside his or her opinion and render a verdict based on the evidence. See *Patton* v. *Yount*, 467

U.S. 1025, 1037 n.12 (1984); *Irvin* v. *Dowd*, 366 U.S. 717, 722-723 (1961). Because the inquiry into a prospective juror's bias turns largely on assessments of "demeanor and credibility that are peculiarly within a trial judge's province," *Uttecht* v. *Brown*, 551 U.S. 1, 7 (2007), appellate review of those determinations is highly deferential. "Reviewing courts are properly resistant to second-guessing the trial judge's estimation of a juror's impartiality, for that judge's appraisal is ordinarily influenced by a host of factors impossible to capture fully in the record—among them, the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty." *Skilling* v. *United States*, 130 S. Ct. 2896, 2918 (2010); see *Wainwright* v. *Witt*, 469 U.S. 412, 428 (1985); *id.* at 429 (noting that the trial judge's "predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record"); *United States* v. *Jimenez*, 513 F.3d 62, 72 (3d Cir. 2008) (trial court's resolution of whether a prospective juror can render a fair verdict entitled to "special deference"); *United States* v. *Tipton*, 90 F.3d 861, 880 (4th Cir. 1996) (appellate review of district court rulings on for cause challenges "is appropriately most deferential"), cert. denied, 520 U.S. 1253 (1997). As the court observed in *United States* v. *Lowe*, 145 F.3d 45 (1st Cir. 1998), "[t]here are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse, than in ruling on challenges for cause in the empaneling of a jury." *Id.* at 49 (quoting *United States* v. *Gonzalez-Soberal*, 109 F.3d 64, 69 (1st Cir. 1997)).

The extraordinary deference accorded a district court's rulings on for-cause challenges also reflects a recognition that juror testimony on voir dire may be

"ambiguous and at times contradictory." *Patton*, 467 U.S. at 1039. As this Court noted in *Patton*, "the lay persons on the panel may never have been subjected to the type of leading questions and cross-examination tactics that frequently are employed," and thus they "cannot be expected invariably to express themselves carefully or even consistently." *Ibid.* For that reason, "it is [the trial] judge who is best situated to determine competency to serve impartially," and he "properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading." *Ibid.*; see *Skilling*, 130 S. Ct. at 2918 ("In contrast to the cold transcript received by the appellate court, the in-the-moment *voir dire* affords the trial court a more intimate and immediate basis for assessing a venire member's fitness for jury service."); *Reynolds* v. *United States*, 98 U.S. 145, 156-157 (1879) ("[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. * * * Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case."); *United States* v. *Moore*, 149 F.3d 773, 780 (8th Cir.) (concluding that district court's credibility determination concerning juror partiality "cannot be manifest error; indeed it is virtually unassailable on appeal"), cert. denied, 525 U.S. 1030 (1998). Thus, "in reviewing claims of this type, the deference due to district courts is at its pinnacle." *Skilling*, 130 S. Ct. at 2923.

The district court acted within its discretion in denying petitioner's for-cause challenge to Juror 31. It is true that Juror 31 initially stated that the incident involving her daughter would make it difficult for her to be fair, and that she was unsure whether that incident

would influence her ability to begin the case presuming the defendant's innocence. But she also stated that she would try to be open-minded and that she thought she would be able to do so. She affirmed her belief that she could set her experience aside, she recognized that her daughter's experience had nothing to do with petitioner's case, and she twice said she would give petitioner the presumption of innocence. That she gave an equivocal answer to defense counsel's inquiry whether her experience would make it difficult to be fair did not automatically disqualify her from service, especially considering her subsequent assurances to the judge. See *United States* v. *Johnson*, 495 F.3d 951, 964 (8th Cir. 2007) (upholding denial of a motion to strike a juror for cause, because "[a]lthough the juror gave some equivocal answers and acknowledged the possibility that his judgment could be affected by some aspects of the case, the district court concluded that juror 600 could be fair and impartial and that his statements reflected the reasonable self doubts of a conscientious and reflective person") (internal quotation marks omitted), cert. denied, 129 S. Ct. 32 (2008); *United States* v. *Alexander*, 48 F.3d 1477, 1484 (9th Cir.) (district court did not abuse its discretion in concluding that when juror said she "believed" she could act impartially, this was equivalent to saying she would do so), cert. denied, 516 U.S. 878 (1995); *United States* v. *Barraza*, 576 F.3d 798, 801-804 (8th Cir. 2009) (no abuse of discretion in refusing to strike for cause a juror who stated his strong feelings about a parent's responsibility could affect his ability to hear the case but stated he would try to be fair), cert. denied, 131 S. Ct. 67 (2010); *United States* v. *Grandison*, 780 F.2d 425, 432 (4th Cir. 1985) (no abuse of discretion in refusing to strike for cause a juror who expressed

doubts as to whether she could remain uninfluenced by the indictment but stated she would try to follow the court's instructions), vacated on other grounds, 479 U.S. 1076 (1987).

Petitioner contends (Pet. 9-13) that the decision below conflicts with this Court's statement in *Reynolds* that "a juror who has formed an opinion cannot be impartial." 98 U.S. at 155. But Juror 31 did not state that she had formed an opinion as to petitioner's guilt, but instead assured the court that she would presume his innocence until the evidence was presented. Nor is this case analogous to the situation in *Irvin* v. *Dowd*, in which the Court ruled that jurors' declarations of impartiality were insufficient where a "barrage" of publicity in a small rural community, including defendant's reported confession to a brutal murder and robbery spree, resulted in a jury composed two-thirds of people who thought petitioner was guilty before the trial began. 366 U.S. at 725-728.

Petitioner further contends (Pet. 13) that this Court should establish a "clear line" requiring dismissal of any juror who indicates a bias unless the juror makes "an unambiguous statement of impartiality." Such a "bright line rule" would be inconsistent with the special deference this Court has accorded to trial judges in this context, as well as with this Court's recognition that jurors "cannot be expected invariably to express themselves carefully or even consistently." *Patton*, 467 U.S. at 1039; see *United States* v. *Wood*, 299 U.S. 123, 145-146 (1936) ("Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.").

Finally, petitioner contends (Pet. 14-15) that the decision below conflicts with *In re Winship*, 397 U.S. 358 (1970), because Juror 31 said she would give petitioner "the benefit of the doubt," rather than explicitly reciting the constitutionally required standard of proof beyond a reasonable doubt. That contention ignores the context of the juror's statement. The juror was not discussing the standard of proof. She referred to giving petitioner the "benefit of the doubt until everything is presented" to assure the court that she would be impartial and would not come to the case with a previously formed opinion as to petitioner's guilt. Given that context, the court of appeals properly "rel[ied] on the trial court's discretion in determining which [of Juror 31's] responses best manifest[ed] the juror['s] true opinions." *Tipton*, 90 F.3d at 880 (quoting *Briley* v. *Bass*, 750 F.2d 1238, 1246 (4th Cir. 1984), cert. denied, 470 U.S. 1088 (1985)). The court of appeals' fact-bound conclusion that the district court acted within its discretion does not implicate any conflict of authority or merit this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ('We do not * * * grant certiorari to review evidence and discuss specific facts.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2011

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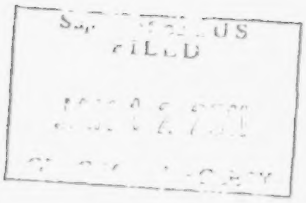

No. 10-594

IN THE SUPREME COURT OF THE
UNITED STATES

WILLIAM ALLEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States
Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The government's brief in opposition relies heavily on the traditional deference to be afforded a district judge in denying for-cause challenges. But the government's brief extends that deference far beyond what has been permitted by previous cases. The government's position is that deference to a district court should be so great that it trumps even what the juror herself has said. Thus, a juror who says that she would have difficulty being fair need not be stricken for cause where the district court believes, based on some separate observation, that the juror could be fair despite her own words. (G. Opp. 6-8) If the level of deference the government seeks were actually the law, denial of for-cause challenges would become essentially unreviewable on appeal. But it is not the law, nor has it ever been.

In order for a reviewing court to afford a district judge deference in denying a for-cause challenge, this Court, as well as lower courts, have always required that the juror must first, at the very least, have made an unequivocal statement evidencing an ability to be fair and impartial. *See*, *Reynolds v. United States*, 98 U.S. 145 (1878); *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639 (1961); *Thompson v. Altheimer & Gray*, 248 F.3d 621 (7th Cir. 2001); *United States v. Garcia*, 936 F.2d 648 (2nd Cir. 1991); *United States v. Gonzalez*, 214 F.3d 1109 (9th Cir. 2000); *United States v. Sithithongtham*, 192 F.3d 1119 (8th Cir. 1999). No such statement was

made by Juror No. 31 in this case, and no deference should be afforded the district judge's determination that Juror No. 31 could be impartial.

It is the absence of an expression of impartiality by Juror No. 31 that warrants this Court's intervention. A clear line should be drawn requiring that a prospective juror who reveals a bias must make an unwavering affirmation of impartiality before she can be seated on a jury. To allow anything less renders appellate review meaningless, for how can an appellate court judge the exercise of discretion that is based on matters outside the record *and* contrary to the juror's own statements?

The government argues that great deference to the district court is warranted because jurors do not express themselves clearly, and are at times ambiguous and contradictory. (G. Opp. 7-8) Allen has no quarrel with this proposition, but it is of no assistance to the government in this case. Juror No. 31 did express herself clearly and unambiguously – she repeated over and over her inability to be fair based on the nature of the charges (child pornography with evidence of molestations) and her prior experience wherein her six year old daughter was nearly kidnapped and molested. When a juror has repeated an inability to be fair and impartial, particularly where that partiality and unfairness is based on a personal traumatic experience, no amount of deference to the trial court can suffice to deny a defendant his right to trial by a fair and impartial jury. *See*, *Irvin*, 366 U.S. at 728 ("[w]here so many, so many times, admitted prejudice, such a

statement of impartiality can be given little weight."). Moreover, a clear rule requiring an unwavering affirmation of impartiality would eliminate problems related to inartful statements by jurors. With a clear line in place and with appropriate questions, a district court can obtain unequivocal statements; *i.e.*, a simple yes or no.

The government also attempts to put a favorable spin on Juror No. 31's statements by claiming that she "twice said she would give petitioner the presumption of innocence." (G. Opp. 9) Juror No. 31 never said she would give Allen the presumption of innocence. Instead, she merely acknowledged that a defendant is entitled to a presumption of innocence, and stated that she might have some trouble with that, but would "try to be open-minded." (App. 32) And, she never "affirmed her belief" that she could set the prior experience with her daughter aside. (G. Opp. 9) Instead, she merely stated that "perhaps" she could. (App. 33)

The cases cited by the government to support the proposition that the statements by Juror No. 31 were sufficient to deny the for-cause challenge are easily distinguishable. For example, the government cites *United States v. Johnson*, 495 F.3d 951 (8th Cir. 2007), to support its position, but a review of the underlying facts set forth in the district court opinion shows that the juror at issue expressed fear that he would accord too much weight to victim-impact evidence, but ultimately agreed that justice required that he "look at the facts and understand the facts." *United States v. Johnson*, 403 F.Supp.2d 721, 787 (N.D.Iowa 2005). Moreover, the juror in

Johnson had not suffered through a prior traumatic experience similar to the offense on trial.

The same is true of *United States v. Barraza*, 576 F.3d 798 (8th Cir. 2009). The juror at issue, while expressing concern that the facts of the case would affect him, never said it would, and instead said that he would do his best not to let the nature of the offense affect him. Like in *Johnson*, he had never suffered any prior experience similar to the offense on trial.

United States v. Grandison, 780 F.2d 425 (4th Cir. 1985), is completely inapposite to the facts of this case. There the juror said she would not let the indictment influence her, and that she had no prejudice, bias or idea that would prevent her from giving an impartial verdict. *Id.*, at 432. Likewise, in *United States v. Alexander*, 48 F.3d 1477 (9th Cir. 1995), one of the jurors at issue, Juror Austin, specifically and unequivocally stated, with an unqualified "yes sir", that he could separate his earlier experience from the facts on trial. Moreover, his earlier equivocal statement expressed a belief in favor of impartiality not against it. *Id.*, at 1483 n. 1. As to the other juror at issue, Juror Kenny, while she never definitively expressed impartiality, her equivocations were also in favor of impartiality, not against it: Juror Kenny stated that she *did not believe* she would be affected by the past, and she *did believe* she could be fair to both sides. *Id.*, at 1483 n. 2.

Here, Juror No. 31 had a past traumatic experience wherein her then six year old daughter

was nearly abducted and molested. She was then called to sit on a jury for the trial of an accused child pornographer, in which the judge had already ruled that evidence of personal child molestation by the defendant was admissible. Her expressions of bias and partiality could not be undone by one statement agreeing to give Allen the "benefit of the doubt." These facts are much more akin to those of *United States v. Gonzalez*, 214 F.3d 1109 (9th Cir. 2000), and *United States v. Sithithongtham*, 192 F.3d 1119 (8th Cir. 1999). In *Gonzalez*, the defendant's conviction was vacated where a for-cause challenge was denied despite the juror never having affirmatively stated she could be fair and impartial, and instead only having stated she would try. Likewise, in *Sithithongtham*, the court held that a for-cause challenge should have been granted based on a juror's statement that he would probably give law enforcement the benefit of the doubt. These statements of partiality and bias, absent any other clear statements of impartiality, required the jurors to be stricken. The same is true for Juror No. 31 here.

The government's argument also incorrectly equates impartiality with the presumption of innocence. Juror No. 31 never said she could be impartial. And, even if she had made statements evidencing an intent to hold the government to its burden of proof by indicating she would give Allen the "benefit of the doubt", Allen was still denied his right to an impartial jury because a biased juror was seated. Judge Wood recognized this distinction in her dissent when she stated:

> "The benefit of the doubt" is not the same thing as impartiality – why should the government want a trial before a juror who has put a thumb on the defendant's side of the scale, if that is what she meant – and if the juror's statement is understood as an attempt at promising to hold the government to its burden of persuasion, it states an impermissibly lenient standard.

(App. 13)

The government misses Judge Wood's second point as well. At best, Juror No. 31 offered to give Allen the "benefit of the doubt."[1] But pursuant to this Court's decision in *In re Winship*, 397 U.S. 358, 361-64, 90 S.Ct. 1068 (1970), such a standard is unconstitutional. Conviction for a criminal offense requires proof beyond a reasonable doubt. *Id.* Because the requirement of proof beyond a reasonable doubt "provides concrete substance for the presumption of innocence", *id.*, at 363, the lenient standard Juror No. 31 promised to apply flies directly in the face of *Winship*.

All of the foregoing makes apparent the need for this Court's intervention and the establishing of a clear line. A juror who expresses a bias but later unequivocally states that she can be fair may be seated if the district court credits the statement. A

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[1] Juror No. 31 only agreed to this lesser standard of proof based on the district court's incorrect statement that it was permissible for her prior traumatic experience to have an impact on her. (App. 35)

biased juror who does not unequivocally state that she can set aside her bias must be stricken for cause. That is not a difficult proposition, nor an unduly burdensome requirement. Juror No. 31 never unequivocally said she could be fair. And, she only agreed to employ a standard of proof that is less stringent than the constitution requires. Allen is entitled to a new trial with an impartial jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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